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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268–0001

COMPLAINT OF THE CONTINUITY SHIPPERS ASSOCIATION

Docket No. C99–4

MOTION TO FILE REPLY AND REPLY OF UNITED STATES POSTAL SERVICE TO VARIOUS PLEADINGS
(October 25, 1999)

The Postal Service hereby moves that it be authorized to file this reply to various pleadings which have been filed recently in response to its Motion to Dismiss filed on October 14.[1] The Postal Service would like to clarify its motion in order to address some apparent misunderstandings regarding its position. We therefore believe that the progress of this proceeding would be served by the instant pleading.

First, regarding the Postal Service's motion to dismiss, the Postal Service has not merely renewed its initial motion to dismiss, which was based only on the complaint document. Rather, the Postal Service is now asking for a substantive dismissal, *i.e.*, a finding by the Commission under 39 U.S.C. § 3662 that the complaint is not justified and that no relief should be granted. The basis for such a dismissal would be the lack of an evidentiary record and the failure of the arguments made to justify relief in any event.

[1/] Continuity Shippers Association Opposition to Postal Service's Renewed Motion to Dismiss (Oct. 19, 1999); AMMA Brief and Opposition to Motion to Dismiss (Oct. 20, 1999); Statement of Association of American Publishers (Oct. 21, 1999).

With respect to the evidentiary record, despite all of the arguments provided by the parties filing recent pleadings, the underlying problem delineated by the Postal Service remains. There is no evidentiary record in this case on which a decision could be based to recommend that the fee be changed. Lawyer's arguments in briefs, including references to matters about which the Commission may allegedly take official notice or which were allegedly established in previous proceedings, do not create evidence. While one could posit the theoretical possibility of a rate complaint based on uncontested facts in which the only issue was a pure interpretation of law, this case is not such a case. Here there are matters of fact and expert opinion which are needed to support the complaint. Certain substantive and procedural steps must be taken to create a record to support an argument that a change in rates should be recommended.

If a party wants to rely on the Postal Service's October 1998 cost study, that party or some other party must move the study into evidence.[2] If a party wants to rely on an adjustment to the cost figure from that study to conform it to the Commission's Docket No. R97-1 mail processing cost methodology, some party must move that calculation into evidence. If a party wants to rely on an inflation factor to "roll forward" that adjusted cost to a future year, some party must move that calculation into evidence and make available a witness for discovery and cross-examination regarding the correctness and appropriateness of that factor and calculation. If a party wants to rely on an analysis of

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[2] AMMA argues that a study that has never been admitted into evidence in the current or any proceeding "is an accepted and acceptable starting point for determining attributable costs." AMMA Brief at 3. To the contrary, the Commission has made it clear that material submitted to it does not have the status of evidence until it is moved and accepted into evidence. *See* Order No. 1201 (Nov. 4, 1997).

the appropriate cost coverage for a particular service in relation to other mail classes and services, it must present testimony explaining such an analysis and make available a witness for discovery and cross-examination regarding that analysis. It cannot first introduce such analyses, based on unsupported facts, in its brief.[3] The Commission is not simply being asked to rely on facts previously established, as AMMA argues in its Brief at 5-6, but on new facts and opinions which have never been litigated.

Even the Commission, if it intends to take official notice of some fact, is bound by its rules to provide parties an opportunity to show the contrary. 39 C.F.R. § 3001.31(j). The Commission has given no notice of such intention.[4] With regard to reliance on evidence from past cases, the Commission generally establishes procedures for allowing parties to move past evidence into the record of a current docket. These procedures provide parties opposed to such reliance an opportunity to be heard in response to such motions.

None of these actions to establish an evidentiary record has been taken in this case. As the Postal Service discussed in its motion to dismiss, due process and the

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[3] *See, e.g.*, AMMA Brief and Opposition at 6 to 7, in which it engages in a novel analysis, unsupported by record evidence, of the relative values of service of different legs of transportation; CSA's Opposition at 3, in which it attempts to explain its misstatement of fact in its brief that the Postal Service "guarantees" return of Bound Printed Matter. Both of these analyses raise factual issues on which the Postal Service has not had an opportunity for discovery and cross-examination.

[4] AMMA apparently believes that the Commission's inquiry as to whether the Postal Service intends to file evidence meets the notice of intent to take official notice under rule 31(j). *See* AMMA Brief at 4-5 (regarding use of CPI-U). The Postal Service believes that the Commission both knows how to and does act with more clarity and appropriate procedures than AMMA's argument would assume. One doubts that AMMA would take such a lackadaisical position if the matters so noticed were adverse to its interests.

administrative standards of review require that appropriate procedures be followed to establish an evidentiary record. Allowing the complainant's tactics to shift the burden of proof to the Postal Service to force it into the position of having to disprove unsupported analyses on which it was afforded no opportunity of discovery and cross-examination is not due process. A decision recommending that the fee be changed, following nothing more than an exchange of lawyers' allegations and arguments, would be arbitrary and capricious and certainly not based on substantial evidence. Meeting the appropriate standard of review is a matter of equal concern to the Commission, which must fulfill its responsibilities under section 3662, and to the Governors of the Postal Service, who ultimately might be required to act subject to judicial review.

Even if the Commission were to view the various allegations as a record, such allegations would not support the relief requested. A cost coverage of 168 percent, under the circumstances alleged by the complainant, simply would not amount to rates not in conformance with the statute under section 3662. If an expert witness had been presented to sponsor the opinions presented only by counsel for the complainant in its brief, the Postal Service could have conducted discovery and cross-examination to discern the witness's opinions concerning factors discussed and not discussed by counsel. Such questions could have elucidated the record regarding the high value of BPRS to both recipients and the original mailer as a means of conducting commerce, including transferring customer information, payments, and merchandise. There could also have been questions regarding the effect on the value of service of the recent enhancement of BPRS to allow a return label feature at no additional fee and to authorize the return to the original mailers of opened and resealed parcels found in the

mailstream. Other questions could have been asked regarding the complainant's belief, repeated in its most recent pleading, that because two services have similar costs, they should have the same cost coverage. There was, however, no opportunity to explore these matters on the record.

Equally importantly, the fact that an argument can be made to support a cost coverage lower than the one previously recommended by the Commission does not establish that the existing rate or fee is not in accordance with the statute. Cost coverages are an issue about which reasonable minds can differ. Rates do not become unlawful because an argument can be made supporting a lower cost coverage. If that were so, every rate recommended by the Commission would be potentially unlawful *ab initio*. But the place to thrash out these arguments is in testimony, discovery, and cross-examination, an opportunity that has been denied the Postal Service due to the complainant's strategy.

The Postal Service also notes that the arguments of the Association of American Publishers regarding Docket No. MC99-3 are completely misplaced. First, the Postal Service did not propose a rate change in that docket. The change requested and recommended was a classification change to allow nonprofit mailers easier access to the regular rate schedule in order to correct a situation that was uniformly acknowledged to be an unintended rate anomaly. The Commission did not intend to put nonprofit mail in an anomalous situation. On the other hand, the BPRS situation is clearly not a rate anomaly. If a rate anomaly were defined as that situation which occurs any time mailers thought their rates were too high, and could make an argument to support a lower cost coverage, most if not all of the rate schedule could undoubtedly

be declared instantly anomalous. The BPRS fee, its cost coverage, and its relationship to other rates, were all intentional.

On the basis of the record, or lack thereof, before the Commission at this time, no change in the BPRS fee has adequately been demonstrated to be warranted. The burden is not on the Postal Service to show that a lawfully established fee is indeed in conformance with the statute. The burden is on the complainant to demonstrate that it is not. It has failed to meet its burden. Accordingly, the Commission should find that the complaint is not justified, deny any relief at this time, and order the docket closed.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking

Scott L. Reiter

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

Scott L. Reiter

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260–1137
(202) 268–2999; Fax –5402
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